IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.5098 OF 2005

M/s. Rozy Mercantile Ltd. & anr. ... Applicants.

V/s.

State of Maharashtra ... Respondents.

Mr. A.P. Mundargi, Sr. Counsel with Mr. I.J. Nankani
i/b. M/s. Nankani & Associates, for the Applicants.

Mr. A.H.H. Ponda for Respondent No.2.

Mr. U.V. Nikam, A.P.P. for the State.

CORAM : A.S. OKA, J.
DATE : 8th SEPTEMBER 2006.

JUDGMENT :-

1. The submissions of the learned Counsel appearing for the parties were heard on the last date. The Applicants have filed this Application under Section 482 of the Code of Criminal Procedure, 1973 taking exception to the Judgment and Order dated 10th October 2003 passed by the learned Additional Chief Metropolitan Magistrate, 6th Court at Mazgaon, Mumbai. The Second Respondent is the complainant in a complaint filed under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881. The Applicants are arraigned as accused in the said complaint. In the said complaint, the learned Magistrate issued process. The learned Magistrate passed an order in the said complaint on 14th May 1999 under Section 256 of the said Code on the ground that the second Respondent was absent and no steps were taken for effecting service to the accused persons. By the said order the complaint

was dismissed and the accused was acquitted. Thereafter, an Application was moved by the second Respondent for restoration of the complaint. By order dated 10th October 2003, the learned Trial Judge allowed the said Application and passed an order of restoration of the complaint.

2. The learned Senior Counsel appearing for the Applicants submitted that the learned Magistrate had no jurisdiction to restore the complaint which was dismissed under Section 256 of the said Code. He submitted that the order under Section 256 of the said Code had effect of acquittal of the accused and therefore, the only remedy available for the second Respondent was to file an Appeal against Acquittal. He placed reliance on the decision of the apex Court in the case of Major General A.S. Gauraya and another V/s. S.N. Thakur and another [(1986) 2 Supreme Court Cases 709)] and submitted that once a complaint was dismissed for non-prosecution, the learned Magistrate had no jurisdiction to restore and revive the dismissed complaint. He submitted that as there was a complete lack of jurisdiction in the learned Magistrate, this is a fit case for exercising power under Section 482 of the said Code.

3. The learned Counsel appearing for the second Respondent has opposed the Petition on various grounds. He pointed out that the complaint was restored on 10th

October 2003 and the present Application under Section 482 has been filed on 9th August 2005. He submitted that in between 10th October 2003 and 9th August 2005, number of events have occurred. He pointed out that on 1st July 2004, plea was recorded. On 10th October 2004, an Affidavit of examinaion-in-chief was filed. On 22nd December 2004, the Complainant lead oral evidence in the form of examination-in-chief and thereafter, he was cross examined on 7 different dates by the Advocate appearing for the Applicants. He submitted that this is not a fit case for exercising power under Section 482 of the said Code. He placed reliance on a decision of learned Single Judge of this Court dated 31st August 2005 in Criminal Writ Petition No.1523 of 2005 in the case of M/s. Doshi Developers & another v/s. State of Maharashtra and another. He submitted that even if this Court is inclined to accept the submissions made by the learned Senior Counsel appearing for the Petitioner, the course which is followed by the learned Single Judge in the said decision should be followed.

4. The learned Senior Counsel appearing for the Applicants submitted that a Special Leave Petition has been filed against the said order dated 31st August 2005 and the Apex Court has issued notice. He pointed out that further proceedings on the basis of the said order have been stayed by the Apex Court. He also placed reliance on the decision of the Apex Court in the case of

Bindeshwari Prasad Singh V/s. Kali Singh reported in (1977) 1 Supreme Court Cases 57.

5. I have carefully considered the submissions. In the case of Doshi Developers and another the learned Single Judge of this Court was dealing with a similar controversy. The learned Single Judge exercised jurisdiction and quashed the order of the learned Magistrate by which the complaint was restored. However, by the same order, the learned Single Judge exercised powers under Section 482 of the said Code and restored the complaint to the file.

6. It will not be out of place here to state that it is well settled position of law that power under Section 482 of the said Code has to be exercised sparingly and to prevent the abuse of process of Court or to secure the ends of justice. The Apex Court in the case of Dinesh Dutt Joshi V/s. State of Rajasthan and Another [(2001) 8 Supreme Court Cases 570] held that the power ot this Court under Section 482 is extraordinary and is to be used only in extra-ordinary cases. In paragraph No.6 of the said decision, the Apex Court held thus :-

> "6. Section 482 of the code of Criminal Procedure confers upon the High Court inherent powers to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. **It is a well-established principle of law that every Court has inherent power to act ex**

debito justitiae to do that real and substantial justice for the administration of which alone it exists or to prevent abuse of the process of the Court. The principle embodied in the section is based upon the maxim: quando lex aliquid alicui concedit, concedere videtur ed id sine quo res ipsae esse non potest i.e. when the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable. The Section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified in the section. As lacunae are sometimes found in the purposes specified in the section. As lacunae are sometimes found in procedural law, the section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are however required to be reserved, as far as possible, for extraordinary cases." (Emphasis supplied)

7. It will be necessary to advert to the facts of this case. On the restoration application filed by the second Respondent, an order was made by the learned magistrate on 10th October 2003 restoring the complaint. On 31st December 2003, the learned Magistrate passed an order on the complaint directing issuance of notice to the Petitioners. Thereafter, the Petitioners appeared in the complaint and on 1st July 2004, plea of the Petitioners was recorded. On 1st October 2004, an affidavit of examination-in-chief was filed by the Second Respondent. On 22nd December 2004, an Application was made on behalf of the Petitioners seeking a direction against the complainant to lead oral evidence. On 22nd December 2004, the recording of examination-in-chief of the first witness of the second Respondent was commenced and was

completed on 3rd February 2005. On the same day, the cross examination of the said witness by the Advocate for the Petitioners was started. The cross examination continued on 16th February 2005, 5th March 2005, 20th April 2005, 21st April 2005, 27th April 2005 and 18th June 2005. As stated earlier, this application was filed in this Court on 9th August 2005. In paragraph No.3 of the Application, it is asserted that while perusing certified copies obtained by the Applicants' Advocate in July 2004, the Applicants became aware about the order of restoration passed by the learned Magistrate. After July 2004, the Applicants participated in the proceeding before the learned Magistrate from time to time till 18th June 2005 without making any grievance about the earlier order passed by the learned Magistrate. Only after cross examining the first witness of the second Respondent on seven consecutive dates that the present Application has been filed. In my view, considering the said conduct of the Applicants, this is not a fit case where inherent power under Section 482 of the said Code should be exercised.

8. A reference will have to be made to the decision of the Apex Court in the case of Major General A.S. Gaurayya and another(Supra). The learned Senior Counsel appearing for the Applicants relied on paragraph Nos.9 and 10 of the said decision. The relevant portion of the paragraph 10 reads thus :-

> " So far as the accused is concerned, dismissal of a complaint for non-appearance of the complainant or his discharge or acquittal on the same ground is a final order and in the absence of any specific provision in the code, a magistrate cannot exercise any inherent jurisdiction."

In the case if Bindeshwari Prasad Singh (Supra) , the Apex Court held that unlike Secion 151 of the Code of Civil Procedure, 1908, the subordinate Criminal Courts have no inherent powers and therefore, the learned Magistrate had no jurisdiction to recall the order dismissing the complaint. At this stage it will be necessary to refer to a recent decision of the Apex Court in the case of Zandu Pharmaceutical Works Ltd.& Others V/s. Mohd. Sharaful Haque and Another [(2005) 1 Supreme Court Cases 122]. In paragraph 8 of the said decision, the Apex Court has observed that all Courts whether Civil or Criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do right and to undo a wrong in course of administration of justice. Paragraph 8 of the said decision reads thus :-

> 8. Exercise of power under section 482 of the Code in a case of this nature is the exception and not the rule. The section does not confer any new powers on the High Court. it only saves the inherent power which the Court possessed before the enactment of the Code. it envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. **It is neither possible nor desirable to lay down**

any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognises and preserves inherent powers of the High Courts. **All Courts, whether Civil or Criminal, possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest" (when the law gives a person anything, it gives him that without which it cannot exist).** While exercising powers under the section, the Court does not function as a court of appeal or revision. **Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist.** Authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the

allegations are accepted in toto."

(Emphasis supplied)

A similar view about the powers of all Criminal and Civil Courts is taken by the Apex Court in the case of Minu Kumari and Another V/s. State of Bihar and Others (AIR 2006 Supreme Court Cases 1937).

9. Considering the law laid down by the Apex court in the aforesaid cases, I find that no case is made out for interference. As stated earlier, the power under Section 482 has to be exercised sparingly and only in extraordinary cases. The power has to be exercised to do real and substantial justice. Considering the nature of the impugned order passed by the Trial Court and the subsequent conduct of the Applicant, the power under Section 482 cannot be exercised. There is no merit in the Application and the same is rejected.

JUDGE